

A comedy of trust errors

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A client recently approached me to perform a legal audit on their family trust. What I found left me exasperated. This article will try provide some practical insight into the kinds of mistakes contained in many of the trusts that I have encountered. It will, I hope, also elucidate the huge need for an examination of trusts from a legal angle. Lastly, I hope it would persuade readers that the drafting of trust deeds and the examination of existing trusts should be done by a fiduciary specialist and not by a general practitioner in the legal and auditing professions.

My client's trust deed and the management thereof were filled with a number of errors. Among others the trust deed required that there be three trustees in office in order to take any valid decisions. However, right from inception only two trustees were appointed and my client had been acting, along with his wife, as the only trustees in office since the trust's inception in 2006, comfortable in the belief that they had the necessary authority to do so. To compound matters ,the trust of which they are the trustees bought two properties in the past year. They, based on the clauses of the trust deed referred to above, clearly lacked the authority to bind the trust.

There has been a spate of recent cases in which the lack of authority of trustees to act have come to the fore. ¹ From these cases it is clear that actions taken by trustees who have not been properly authorised in accordance with the terms of the trust deed are invalid and usually they cannot on an *ex post facto* basis be corrected. Typically too these issues arose in property transactions where the lack of proper authority has repeatedly and successfully been used as an excuse by the purchasers and the sellers to renege on the sale when it suited them to do so.

¹ Refer to the cases of: Land and Agricultural Bank v Parker [2004] 4 All SA 261 (SCA); Thorpe v Trittenwein 2006 (3) SA 427 (SCA); Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others, Van der Merwe NO and Others v Bosman and Others 2010 (5) SA 555 (WCC)

A quote from the judgement of Thorpe v Trittenwein² (a case which in many respects is quite similar to that of my client's) reveals a growing impatience on the part of the courts with regard to the fast and loose manner in which those using trusts treat the trust form: *"Those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage, whether it be in estate planning or otherwise. But they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not. If the result is unfortunate, Thorpe has himself to blame."*

In my client's case I was pleased to be able to advise them that as the trust and the seller had both performed under the void contract that the sale is, in terms of section 28(2) of the Alienation of Land Act, endowed with retrospective validity. But this places my clients in the interesting position that while the purchase of the fixed property is now valid, the surrounding actions by the trust, such as entering into loan agreements for the purchase price, are not.

Shortcuts in trust administration are likely to lead to situations such as the one described above and will likely expose the trustees, in their personal capacities, to claims for damages by the beneficiaries of the trust and possibly also to claims by the other party to the agreement. Trustees should, when considering acting on behalf of a trust, ensure that they obtain the specialist advice of a fiduciary practitioner before doing so. The alternative could be some very costly surprises.

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Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client funds. FISA has over 700 individual members, who collectively manage in excess of R260 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

² 2006 SCA 30 RSA at par 17